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No. 09-1372

In the Supreme Court of the United States

MEDISON AMERICA, INC.,
a California corporation,

Petitioner,

v.

PREFERRED MEDICAL SYSTEMS, LLC,
a Tennessee limited liability company;
JERRY K. MCGUIRE AND GREGG REED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

A lengthy reply is unnecessary in this case. The Respondent's own statement of the district court's basis for entry of summary judgment (Brief in Opposition at 21-30) demonstrates that the law of summary judgment in the federal courts is in disarray.[1] The district court — applying what the Respondents characterize as the correct view of *Celotex* — weighed the evidence, ignored permissible factual inferences, and demanded proof from the plaintiff of such quality that the summary judgment motion amounted to a mini-trial rather than a determination of whether there was a genuine issue of material fact to be tried.

The proceedings here echo the proceedings on remand in *Celotex* itself. *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). Writing the opinion for the D.C. Circuit, Judge Starr opined that shifting the burden to the nonmovant did not mean that the nonmovant had to try her case on summary judgment. Judge Starr explained that summary judgment was improper because "the issue of exposure [to asbestos] was not so one-sided that Celotex was entitled to judgment as a matter of law." *Id.* at 39.

Dissenting, Judge Bork opined that summary judgment was proper because plaintiff had failed to produce "specific facts" (i.e., a witness with firsthand

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[1] See Stemmman, Adam N, "*The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*," 63 Wash & Lee Rev. 81 (2006).

personal knowledge) in the form of admissible evidence. *Id.* at 41-42 (Bork, J., dissenting). The logical extension of Judge Bork's opinion is that circumstantial evidence would not be enough for a nonmovant to turn back a summary judgment.

The primary contrast in the Starr view and the Bork view is that the former denies summary judgment on indirect evidence (to be taken in the light most disfavorable to the movant with all reasonable inferences drawn against the movant and in favor of the nonmovant) while the later denies summary judgment only if the nonmovant produces admissible at-trial direct evidence (e.g., eyewitness) sufficient to prove (not just dispute the movant's evidence) the nonmovant's case. This is an apples-oranges difference, but both, now, are travelling full bore in the law under the same "summary judgment" label, resulting in inter-Circuit and intra-Circuit splits in application.

The Starr view focuses on the creation of a genuine issue of material fact by conflicting evidence while the Bork view focuses on the quantum and quality (i.e., weight) of a plaintiff's evidence once a defendant shifts its burden.

What occurred in the courts below is an example of the ways this Court's summary judgment precedent continues to be ignored. All 50 states could adopt *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991) and *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008). Such a state of the law would force upstanding litigators to forum shop (i.e., plaintiffs must always avoid federal courts and defendants must always remove to federal court) at

risk of malpractice for failing zealously to represent a client.

Clearly, the district court here followed the Bork view to the exclusion of the Starr view. The district court below permitted the defendant to shift the burden of production to the plaintiff by merely summarizing the evidence in the form it surfaced during pretrial discovery.

Although the issue on remand in *Celotex* was the nonmovant's response, rather than the movant's motion, the decision on remand illustrates the danger that the interpretation of *Celotex* adopted by the district court here will result in a mini-trial with no live witnesses and no jury to weigh the cumulative effect of all of the in-person testimony after assessing each witness's credibility. By requiring so little of the movant here, the district court's interpretation of *Celotex* failed to focus the inquiry on a particular element of any particular cause of action alleged by plaintiff. Instead, the district court forced the plaintiff, at the pretrial discovery stage, to produce *all* its evidence, in admissible form, on *every* theory, transforming the district court from an arbiter of whether there was a factual dispute into an arbiter of the factual disputes – a fact-finder.

If, as Respondent contends, this is a correct application of *Celotex*, then the argument that summary judgment is unconstitutional becomes urgent; instead of a jury trial, the nonmovant gets a bench trial, in violation of its right to a jury trial under the Seventh Amendment. *See* Suja A. Thomas, *Why Summary Judgment is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 Iowa L. Rev. 1667

(2008); Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 Iowa L. Rev. 1613 (2008); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 Va. L. Rev. 139 (2007).

The district court's application of *Celotex* also demonstrates why the *Erie* doctrine, or the Rules Enabling Act, require that federal courts sitting in diversity cases apply state summary judgment standards.

Where state law, like Tennessee's, requires the movant to negate an essential element of the nonmovant's case in order to shift the burden to a nonmovant, summary judgment is not transformed into a mini-bench trial on a paper record. Instead, the negation requirement focuses the nonmovant's and the court's attention on each specific element of each specific theory, one by one, and permits the proper question to be asked: Is there a genuine issue of material fact with regard to each particular element, separately considered?

Contrary to Respondent's suggestion (Brief in Opposition at 32-38), the issue of whether the state or federal summary judgment law should apply in diversity cases cannot be answered by merely labeling summary judgment "procedural." True, the term "procedural" can be used as a shorthand *post hoc* label for a federal law that can constitutionally be applied in diversity actions, while "substantive" is a shorthand *post hoc* label for state laws that the Constitution requires to be applied in diversity actions. Using these labels, summary judgment is "substantive."

Professor Adam Steinman has cogently explained one of the ways in which summary judgment is substantive:

> When a court applies a summary judgment standard under which it declares the evidentiary material generated by the parties' primary conduct to be inadequate as a matter of law, it is in a very real sense dictating the legal consequences of the primary conduct itself and, therefore, modifying substantive rights. Consider the variety of primary-activity regulations that hinge on the defendant's intent or state of mind. To make out a state law consumer fraud claim, a plaintiff might have to prove that the defendant acted with scienter, that is, knowledge that its statements about its product were false. In an employment discrimination case a plaintiff may have to prove that the defendant's decision was based on race, gender, or some other impermissible factor. Frequently, the defendant's primary conduct will not generate smoking gun evidence of the defendant's state of mind. Thus plaintiffs often must rely on **indirect evidence**. In a consumer fraud case, a plaintiff may point to contemporaneous information contradicting the defendant's representations, even if there is **no direct evidence** that the defendant knew about that information at the time. In an employment discrimination case, a plaintiff may point to evidence undermining the defendant's purported justification for its employment decision, even if there is **no direct evidence** that the real motivation was unlawful discrimination. A state court may look at the

> plaintiff's **indirect evidence** and find it sufficient to sustain a jury verdict in plaintiff's favor. But a federal court, applying the more stringent federal approach to summary judgment, might find the **indirect evidence** legally insufficient. The evidence a plaintiff can use to prove its case, however, is ultimately a function of the defendant's primary conduct. If a state court would allow that evidence to sustain a jury verdict in the plaintiff's favor, but a federal court would mandate judgment as a matter of law against the plaintiff, there is a stark contrast in the ability of plaintiffs to enforce their state law substantive rights. (emphasis added)

Adam N. Steinman, *What is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 Notre Dame L. Rev. 245, 289-90 (2008) (applying an REA analysis and noting that the argument is even stronger under the aegis of an "unguided *Erie* choice").

As pointed out in the Petition in this case, the federal courts uniformly apply state law directed verdict standards in diversity cases, recognizing that the question of the **sufficiency of the evidence** to support a verdict **is a "substantive"** one. *See also* Steinman, *supra*, at 290-93.

To the extent *Celotex* advances the directed verdict inquiry to the summary judgment stage, the practice of the federal courts themselves demonstrates that summary judgment is "substantive." Where federal law permits the entry of a judgment on the merits (and summary judgment indisputably is a judgment on the

merits) without requiring negation by the movant, the nonmovant can be deprived of a substantive right – its very cause of action – under federal law when it would not be so deprived under state law. Principles of federalism will not tolerate such a result. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001).

This case presents vitally important questions of federal law that require decision by this Court. Therefore, the Petition for Certiorari should be granted.

Respectfully Submitted,

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